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In the Supreme Court of the United States

October Term, 1988

LOCKHEED CALIFORNIA COMPANY,
a Division of LOCKHEED CORPORATION,
LOCKHEED CORPORATION,
K. E. KLEINBERG AND JAMES KALISH,

Petitioners,

v.

KURT BIRTELL,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITION

FOR WRIT OF CERTIORARI

Respondent, KURT BIRTELL, (hereinafter referred to as "Birtell") respectfully opposes the Petition of LOCKHEED-CALIFORNIA COMPANY, a Division of LOCKHEED CORPORATION, LOCKHEED CORPORATION, K. E. KLEINBERG and JAMES KALISH (hereinafter referred to collectively as "Lockheed") for a Writ of Certiorari to review the decision of the California Court of Appeal, Second Appellate District, Division Four, which was entered in this case on May 17, 1988. Review was properly denied by the California Supreme Court by its order of August 25, 1988.

I

QUESTIONS PRESENTED

This case arises from the employment relationship between Birtell and Lockheed, wherein Lockheed has trammelled upon Birtell's rights to be free from retaliatory harassment and discipline for having disclosed information to a government agency. The resolution of this matter turns on the question of whether federal labor law preempts Birtell's state law claims for violation of public policy, unfair employment practices (California Labor Code §1102.5), conspiracy to retaliate and intentional infliction of emotional distress.

The California Court of Appeal, Second Appellate District, Division Four, held that in this instance, federal labor

law did not displace Birtell's state law claims. Contrary to Lockheed's assertion, there is neither necessity nor justification for this Court to consider the decision and opinion filed by the Court of Appeal. Clear standards of law have been enunciated by which the issue of preemption is to be decided. Such standards were correctly applied to the facts of the instant case by the Court of Appeal.

II

STATEMENT OF FACTS

A. Birtell's Employment

Lockheed originally employed Birtell in August, 1979 as a Magnetic Particle Inspection Operator (Trainee) at Plant B-1. He excelled in performance of his duties and quickly received certification in "Penetrant Inspection".

Penetrant inspection is considered entry-level work, involving mostly manual inspection and testing of materials. As Penetrant Inspector, Birtell enjoyed an excellent relationship with management and his co-workers. He received regular satisfactory performance evaluations.

In January, 1980 Lockheed recognized Birtell's potential and assigned him to training in Ultrasonics Non-Destructive Testing ("NDT") Although he received Level I certification in June, 1980, he was not permitted to perform inspections alone because he had not yet satisfied time-in-job requirements specified by the military. Later that year he received Level II certification in ultrasonics as well as an interim secret clearance. He

received permanent secret clearance in November and top secret clearance in early 1981.

His duties as Ultrasonics Inspector included inspection and certification of materials being manufactured for various departments of the United States military. Birtell worked primarily on Advanced Development Projects ("ADP"), top secret projects, such as the Trident C-4, SR-71, T-38, and P3-Orion. ADP projects are considered to be the best positions in terms of salary and career potential. Such work is closely regulated by the federal government and specific requirements, including training of the inspectors, are detailed in United States Military Specifications and included in Lockheed's contracts with its customers.

The work of certified Ultrasonics Inspectors is crucial. They are responsible for inspecting parts and certifying that inspected parts had no defects, or, if defects were found, stating what they were.

B. Discovery of Safety and Security Violations

During his assignment in the NDT Laboratory Birtell observed that the inspection procedures on the C-4 Trident missile nose cap were not being done according to Military Specifications.

He also began to form the opinion that other tests being performed by the Ultrasonics Inspectors were not proper, and that there may even have been improper certification of certain inspectors. One area of concern involved

the "Panic Program" on the P-3 Orion engine mounts, which was inspected by trainees, without necessary supervision. It was Birtell's understanding that Military Specifications required certified inspectors at a minimum Level II.

In addition, Birtell became concerned about another aspect of testing: calibration standards used on L-1011 bonded panels. These concerns were brought to the attention of his managers, but to Birtell's dismay, no action was taken to address or correct the problem areas.

C. Office of Special Investigations Complaint

Mindful of the highly sensitive nature of the projects on which he was working, Birtell eventually contacted the

U.S. Air Force Office of Special Investigations ("OSI") to discuss the concerns hereinabove noted. At no time did Birtell disclose any confidential information.

OSI planned to conduct an investigation. Birtell was advised not to reveal the proposed investigation. At work the next day, Birtell was confronted by management about not revealing company problems to outside entities. Birtell began to sense the distinct possibility of retaliation.

D. Retaliation

Three days later Birtell was "debriefed" by Lockheed's Security Department, who pulled his access to security projects without explanation. He was immediately downgraded and transferred from the NDT lab, and to

date, has not been returned. His fear of possible retaliation turned into reality. In fact, Birtell's continued employment with Lockheed has been threatened on a regular basis.

Birtell did file grievances with his union, the International Association of Machinists and Aerospace Workers and Plant Protection Lodge No. 1638/Aeronautical Industrial District Lodge 727, in an attempt to regain his security access and payment of overtime missed due to lack of such access. He alleged that his ADP access badge was pulled because he complained of several security violations to the OSI.

After some initial discussion with Lockheed, Birtell believed it would be futile to pursue his grievances. The union agreement does not address the

issue of whistle blowing or retaliation for whistle blowing. Nor does it provide for compensatory or punitive damages to redress harm caused by outrageous and unlawful retaliatory conduct of the type alleged.

Although his security access was eventually restored and in spite of his excellent past performance and qualifications, Birtell remains in an entry level position, performing penetrant inspection work. He has been repeatedly passed over for return to his former duties and responsibilities, while various individuals lacking requisite qualifications and/or certifications were selected for Ultrasonics Inspector or other positions in Quality Assurance to which Birtell, should have been assigned.

Lockheed has consistently denied

there was any basis for Birtell's complaints to OSI. Yet shortly after Birtell's complaints and the OSI investigation, Lockheed retained an independent consultant to review compliance with Military Specifications. That review resulted in various recommendations for procedural changes, some of which bear directly on areas about which Birtell had complained, e.g., improper training of inspectors, and improper certifications. Moreover, the OSI investigator felt there was more than sufficient evidence to refer the matter to the U.S. Attorney's office.

E. Damages

Birtell has continued in employment at Lockheed, performing well in his lesser current position. But, he

feels no real satisfaction; instead he lives with the constant threat of termination, ostracism from his co-workers, and total intimidation. This is the reward Lockheed, and its managers, have bestowed on him for exercising his legal rights and fulfilling his duty as an employee and an American citizen. This is the reward others at Lockheed can look forward to if they choose to report wrongdoing and fraud, out of genuine concern for public safety and national security.

As a direct result of the outrageous continuing retaliation and harassment inflicted on him by defendants, Birtell has suffered severe emotional distress and anguish, for which no remedy is provided under the terms of the applicable collective

bargaining agreement.

III

REASONS FOR DENYING THE WRIT

A. Federal Labor Law Does Not Preempt State Rules That Proscribe Conduct or Establish Rights and Obligations, Independent of a Collective Bargaining Agreement.

It is beyond cavil that, as a general rule, federal labor policy requires employees covered by a collective bargaining agreement to utilize available contract grievance procedures to redress employment disputes. Teamsters Union v. Lucas Flour Company, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962). Birtell has never denied this fact. However, it is also beyond cavil that not every suit

concerning employment will be preempted by federal labor law. Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971).

Recognizing the broad preemptive force of Section 301 of the Labor Management Relations Act (hereinafter "LMRA"), this Court decided Lingle v. Norge Division of Magic Chef, Inc., ___ U.S. ___, 108 S.Ct. 1877, 56 U.S.L.W. 4512 (June 6, 1988). A simple, straightforward test was reenunciated, based on reasoning developed in Lucas Flour, supra, and Allis-Chalmers Corporation v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985):

> Thus, Lueck faithfully applied the principle of § 301 preemption developed in Lucas Flour: if the resolution of a

> state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted and federal labor-law principles -- necessarily uniform throughout the nation -- must be employed to resolve the dispute. Lingle, 108 S.Ct. at 1881. (Footnotes omitted)

Despite Lockheed's fervent desire to escape responsibility in tort for its actions, their efforts to unduly complicate this standard must fail. Just as in Lingle, supra, the instant claim

for retaliatory action can be decided without interpretation of any term of the collective bargaining agreement governing the employment relationship between the parties. As this Court aptly observed:

> To defend against a retaliatory discharge claim, an employer must show a non-retaliatory reason for the discharge, (citation omitted); this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement. Lingle, supra, at 1882.

The Court of Appeal properly applied that standard in rejecting petitioners' argument below:

> [A]s long as California state law establishes a right in plaintiff independent of that agreement there is no preemption. Accordingly, we must determine whether there is an issue of material fact whether the subject matter of this suit is actionable under California law independent of the subject collective bargaining agreement. Birtell v. Lockheed-California Company, et al., Appendix "A" to Lockheed's Petition at page A-12. (Emphasis in original.)

B. **California Has Prohibited Employment Retaliation for Whistle-Blowing in an Effort to Protect the Health, Safety and Welfare of Its Citizens.**

Lockheed has argued, both here and below, that there is no legitimate state interest, justifying exception to the general policy of preemption. Lockheed avers that Labor Code §1102.5 is "not directed to any legitimate interest of the State of California and the health and welfare of its citizens". (See, Petition, page 14.) Yet, the Ninth Circuit Court of Appeals decision in Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984) specifically held to the contrary:

> California's interest in providing a cause of action

> for violation of public policy or a statute is the enforcement of the underlying statute or policy, not the regulation of the employment relationship. Garibaldi, 726 F.2d at 1374.

Throughout this litigation, petitioners have denigrated and misconstrued Birtell's claims, asserting that no state public policy is at issue. But Birtell is a "whistle-blower" in a classic sense, in grave need of protection. He became aware that certain certification and inspection procedures at Lockheed were not being followed, and reported his concern to what he believed was the appropriate governmental agency. He was concerned that Lockheed may have been in breach of its contract with the Government and that federal regulations

may have been violated. His primary concern, however, was for his fellow citizens, both in California and elsewhere, who could be hurt or killed if an improperly manufactured airplane were allowed in the air because of a faulty or cursory inspection by an unqualified employee. Petitioners have cavalierly dismissed, without analysis, the significant state interest in protecting the health and safety of its citizens from the possibility of an airline disaster.

Moreover, California has a direct interest in encouraging and promoting the exposure of health or safety violations by offering protection to individuals who report such violations to appropriate state or federal agencies. Yet Lockheed would deprive Birtell of such protection,

asserting that his claims "refer solely to matters of federal concern which are expressly sanctioned as the proper subject of collective bargaining agreements". (See, Petition, page 18.)

To assert that the information reported by Birtell did not impact any legitimate California interest is misguided. Not only does Birtell allege non-negotiable state law claims for violation of public policy within the exception to preemption allowed by Lingle, supra, Garibaldi, supra, Paige v. Henry G. Kaiser, 826 F.2d 857 (9th Cir. 1987), and others, he alleges a viable cause of action for violation of California Labor Code §1102.5.

Congress never intended to "preempt state rules that proscribe conduct, or establish rights and

obligations, independent of a labor contract." Allis-Chalmers, 471 U.S. at 212. Federal law does not direct bargaining on the subject matter of these claims, that is retaliation for whistle-blowing. Moreover, there is absolutely no evidence that the collective bargaining agreement here at issue even mentions, let alone provides protection for, the subject.

Thus, where resolution of state law claims can be made without reference to the terms of a collective bargaining agreement, preemption is inappropriate, and the Court of Appeal so held. It is well settled that §301 does not "delegate to unions and unionized employers the power to exempt themselves from whatever labor standards they disfavor." Allis-Chalmers, 471 U.S. at 211. The

Court of Appeal was correct in rejecting petitioners' analysis, which confuses the issues of independence from the labor agreement and the weight of the state policy to be furthered. Under this Court's analysis in Allis-Chalmers, supra, and San Diego Unions v. Garman, 359 U.S. 236 (1959), it is unnecessary to balance the state interest against the federal interest. If the prerequisites to preemption are met, regardless of the state interest, state law will fall to federal law.

Petitioners have also mischaracterized the Legislature's express purpose in enacting §1102.5, suggesting that it was only designed for "at-will employees with some minimum protection against retribution by an employer". (See, Petition, page 19.) The

legislative history cited by petitioners in support of that proposition nowhere mentions "at-will" employees. In fact, the full quote from the staff comments to A.B. 2452, the precursor of Labor Code §1102.5 states:

> The intent of this measure is to afford employees some minimum protection against retribution by an employer when the employee reports crimes or violations of the law incurring at his or her place of employment. (Emphasis added.)

Petitioners attempt to distinguish Garibaldi, supra, and Local 24, Teamsters v. Oliver, 358 U.S.283 (1959) arguing that Birtell has no state law claims for violation of public policy or for violation of the California Labor

Code §1102.5. Such results are ludicrous, and contrary to legal precedent. By this reasoning, an employee of Lockheed, not covered by a collective bargaining agreement, in the exact same circumstances as Birtell, would be able to recover in tort for all harm suffered as a result of retaliation.

The instant action presents the very circumstances envisioned by the California legislature in offering protection for whistle-blowers. Birtell, as a result of his choosing to report wrongdoing, has become a persona non grata at Lockheed, pigeonholed, stifled in a previously exceptional career. He has been ostracized from his co-workers, threatened and intimidated. He has been demoted, denied training, overtime hours, and promotion. He is denied even the

smallest dignity our society requires employers to give employees - recognition for a job well done. Petitioners would have this court disregard the significant harm suffered by Birtell, and limit him to the grievance procedure provided in his labor contract, a contract which neither in spirit nor in substance addresses this issue.

C. **No Need for Review Has Been Established by Petitioners, as the Test for Preemption Has Been Clearly Articulated by the Supreme Court, and Followed by Other Courts in Subsequent Decisions.**

Throughout the various opinions dealing with this question, the articulation of the test for preemption has remained constant. See, generally,

Lingle, supra; Allis-Chalmers, supra; International Brotherhood of Electrical Workers AFL-CIO v. Hechler, ___U.S.___, 107 S.Ct. 2161, 95 L.Ed.2d. 791 (1987), Caterpillar, Inc. vs. Williams, ___U.S.___, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

Petitioners cite to several post-Lingle decisions in a desperate attempt to create confusion sufficient to justify the requested Writ. Willoughby v. Central Illlinois Light Co., 108 S.Ct. 2812 (1988); Doherty v. Pansec Inc., 108 S.Ct. 2812 (1988); Clark et al. v. Momence Packing Co., 108 S.Ct. 2813 (1988); Martin v. Carling National Breweries, 108 S.Ct. 2813 (1988) Hanneken v. Dixon Distributing Co., 108 S.Ct. 2813 (1988); DeSoto v. Yellow Freight Lines Co., 108 S.Ct. 2813 (1988); Mays v. R.J.

Reynolds Co. 108 S. Ct. 2814 (1988).

However, in each case cited, the lower Court had held the state law claims pre-empted by federal law. In each case cited, this Court reversed and remanded, with instructions to reconsider in light of Lingle, supra.

As demonstrated hereinabove, the Opinion of the California Court of Appeal in this case comports with Lingle. There is thus no need for this Court to intervene, or to correct the Opinion below.

IV

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 6380 Wilshire Boulevard, Suite 1404, Los Angeles, California 90048; that on December 23, 1988, I served the within **Response to Petition for Writ of Certiorari** in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 23, 1988, at Los Angeles.

Kate Johnson

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